

ORIGINAL

DOCKET FILE COPY ORIGINAL

RECEIVED

JAN - 7 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Implementation of the) CC Docket No. 96-128
Pay Telephone Reclassification and)
Compensation Provisions of the)
Telecommunications Act of 1996)

To: The Commission

**COMMENTS ON AND OPPOSITION TO
PETITIONS FOR RECONSIDERATION**

AIRTOUCH PAGING

Mark A. Stachiw
Vice President & Senior Counsel
AIRTOUCH PAGING
12221 Merit Drive
Suite 800
Dallas, TX 75251
(972) 860-3200

Carl W. Northrop
E. Ashton Johnston
PAUL, HASTINGS, JANOFISKY
& WALKER LLP
1229 Pennsylvania Avenue, N.W.
10th Floor
Washington, D.C. 20004-2400
(202) 508-9500

January 7, 1997

No. of Copies rec'd
List A B C D E

0214

TABLE OF CONTENTS

SUMMARY	ii
I. The Commission Should Immediately Issue a <i>Notice of Proposed Rulemaking</i> Seeking Comment On Issues Left Unresolved in the <i>Remand Order</i>	1
II. The Commission’s Inconsistent Treatment of Call Blocking Renders the <i>Remand Order</i> Arbitrary and Capricious	4
III. The New Per-Call Default Rate Overcompensates PSPs for the Provision of Payphone Specific Coding Digits, and for Other Cost Elements	7
IV. The Commission’s Regulatory Flexibility Analysis Failed to Consider the Interests of All Affected Parties	10

SUMMARY

AirTouch Paging (“AirTouch”) hereby submits its comments in support of certain petitions for reconsideration of the Commission’s *Remand Order* in the payphone compensation proceedings. Specifically, AirTouch agrees that the Commission should reconsider its decision in the *Remand Order* not to address alternatives to “caller pays” and “market rate” per-call compensation mechanisms. AirTouch also supports petitioners’ arguments that the record regarding call blocking renders the *Remand Order* arbitrary and capricious.

AirTouch agrees with petitioners’ arguments that the default compensation rate remains unjustifiably high, and opposes petitions asking the Commission to increase the default rate.

Finally, AirTouch believes that the Commission has failed to consider the impact of its payphone decisions on 800 number subscribers and other entities, as required by law.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Implementation of the)	CC Docket No. 96-128
Pay Telephone Reclassification and)	
Compensation Provisions of the)	
Telecommunications Act of 1996)	

To: The Commission

**COMMENTS ON AND OPPOSITION TO
PETITIONS FOR RECONSIDERATION**

AirTouch Paging ("AirTouch"), by its attorneys and pursuant to Section 1.429(f) of the Commission's Rules, hereby submits its comments on, and opposition to, petitions for reconsideration of the Commission's *Second Report and Order* in CC Docket No. 96-128, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, FCC 97-371, released October 9, 1997 (the "*Remand Order*"). The following is respectfully shown:

**I. The Commission Should Immediately Issue a
*Notice of Proposed Rulemaking Seeking Comment
On Issues Left Unresolved in the Remand Order***

1. In the *Remand Order*, the Commission declined to address issues other than the amount of the per-call default compensation rate. Despite considerable evidence in the record demonstrating that the policy objectives embodied in Section 276 of the Act could be accomplished more effectively and efficiently by fundamental changes in the

payphone compensation scheme, the Commission stated that “[t]o the extent that we decide to revisit any of these issues, such review will be addressed in a subsequent proceeding.”^{1/}

2. The petitions for reconsideration of the *Remand Order* provide a substantial basis for changing the Commission’s carrier pays compensation system and the purported “market-based” default compensation rate.^{2/} Alternative compensation mechanisms, such as caller pays and measured rate compensation, have been justified.^{3/} Should the Commission decline to adopt these alternatives on reconsideration, AirTouch agrees with PageMart that the Commission should immediately initiate a new proceeding seeking comment on the following changes to the payphone compensation rules, which comply with Section 276 of the Act and minimize the impact of PSP compensation on all payphone users:

^{1/} *Remand Order*, para. 132.

^{2/} See, e.g., Petition for Reconsideration of AT&T Corp. (“AT&T”) at 3, 4, 7, 12, 16; Petition for Reconsideration of Mobile Telecommunications Technologies Corp. (“Mtel”) at 2-6, 6-8; Petition for Limited Reconsideration of Paging Network, Inc. (“PageNet”) at 5, 18; Petition for Reconsideration of Source One Wireless II, L.L.C. (“Source One”) at 3, 5; Petition for Reconsideration of Consumer-Business Coalition for Fair Payphone-800 Fees (“Consumer-Business Coalition”) at 17; Petition for Reconsideration of the Direct Marketing Association (“DMA”) at 4.

^{3/} See, e.g., Mtel Petition at 8; PageNet Petition at 5-16; Petition for Reconsideration of PageMart Wireless, Inc. (“PageMart”) at 3-8; Source One Petition at 5; Petition for Reconsideration of American Alpha Dispatch Services, Inc., et al. (“AADS”) at 4-6.

- designate a unique 8XX code for toll-free calling from payphones.^{4/} The Commission rejected a caller pays system in part in order to avoid having the calling party place a “coin in the box.”^{5/} Although AirTouch continues to believe that the person completing any call from a payphone should be required to directly compensate the PSP at the rate set by the PSP and posted at the payphone, an alternative would be to establish a unique 8XX code (e.g., 877) which would be toll-free with respect to long distance charges, but could be accessed from a payphone only if the person initiating the call deposits coins. IXCs would not establish toll-free access codes within this 8XX code if they did not want their customers to be required to deposit coins in order to complete a dial-around call. This solution creates consumer choices and eliminates concerns about blocking by PSPs, which is forbidden by TOSCIA.
- establish a fair compensation rate based on the duration of the call, as proposed by PageNet and others.^{6/} The record is undisputed that 800 subscriber calls are of shorter duration than other calls placed from payphones, yet the Commission failed to make any adjustment to the compensation rate based on this fact.

While AirTouch believes these changes should be made on reconsideration of the *Remand Order*, out of an abundance of caution, and mindful of the Commission’s stated intent to address separately issues other than the compensation amount, AirTouch intends to formally ask the Commission to initiate a proceeding within the next 30 days to address proposals initiated by AirTouch.

^{4/} This was previously proposed by AirTouch and has received widespread support. See PageMart Petition at 8-9; Source One Petition at 8. See also Reply Comments filed September 9, 1997, in CC Docket No. 96-128 by PageNet at 5 and by Personal Communications Industry Association at 7.

^{5/} See *Order on Reconsideration*, para. 88.

^{6/} See PageNet Petition at 5; PageMart Petition at 4.

II. The Commission's Inconsistent Treatment of Call Blocking Renders the Remand Order Arbitrary and Capricious

3. The Commission's failure in the *Remand Order* to resolve call blocking issues raised by commenters in the remand proceeding cannot be justified, as noted by petitioners Mtel and Source One. On appeal of the first *Report and Order* in this proceeding, the Commission argued before the Court of Appeals that the original default compensation rate should be upheld because IXCs "will be able to 'block' calls from overpriced payphones and, therefore, will be able to negotiate lower rates if the local coin rates are too high."^{7/} The Court upheld the decision to implement an "IXC pays" compensation scheme in large measure because of the availability of call blocking, concluding that "the FCC's assumption that IXCs have the capacity to 'block' calls is reasonable."^{8/} The Commission seized upon this language from the Court's decision as an excuse to decline to "revisit the issue of ... whether carriers can block, [which was] already addressed in the *Payphone Orders*, and upheld by the Court."^{9/}

4. Since the *IPTA* decision, however — and as the Commission was fully aware when it adopted the *Remand Order* — certain of the Commission's assumptions about call blocking have proved to be incorrect, making the *Remand Order* arbitrary and

^{7/} *Illinois Public Telecommunications Ass'n v. FCC*, 117 F.3d 555, 564 (D.C. Cir. 1997) ("*IPTA*").

^{8/} *Id.* at 564; *see id.* at 567.

^{9/} *Remand Order*, para. 132.

capricious. It is undisputed that the ability to track and block a call from a payphone is predicated on the transmission by that payphone of specific coding digits that identify the call as one placed from a payphone.^{10/} The Commission earlier had required the transmission by PSPs of payphone-specific coding digits as a prerequisite to their eligibility for default per-call compensation.^{11/} However, immediately following the *IPTA* decision, numerous LECs advised the Commission that they would have difficulty timely implementing their coding digit obligations,^{12/} and they subsequently requested broad waivers of those obligations.^{13/} On October 7, 1997, two days before the effective date of per-call compensation obligations and the PSPs' own obligations to provide payphone-specific coding digits, PSPs were granted limited relief from their obligations, but nonetheless were allowed to collect compensation.^{14/}

^{10/} "The Commission's rules require that LECs provide certain automatic number identification information (ANI ii) to the IXC with each call. These digits provide IXCs with automated information that enables them to bill, block, and track calls." *Remand Order*, para. 57.

^{11/} *Order on Reconsideration*, para. 64.

^{12/} *See, e.g., Ex Parte* Notices of United States Telephone Association, June 19, 1997 and July 28, 1997.

^{13/} Petition for Waiver filed by United States Telephone Association, Sept. 30, 1997; Petition for Waiver filed by LEC ANI Coalition, Sept. 30, 1997; Petition for Waiver filed by TDS Telecommunications Corporation, Oct. 1, 1997.

^{14/} *Order*, CC Docket No. 96-128, DA 97-2162 (rel. October 7, 1997).

5. In the *Remand Order*, the Commission, notwithstanding that coding digits are a prerequisite to call blocking, that the Court's affirmation of the carrier pays compensation scheme was premised on Commission assurances that call blocking was viable, and that the PSPs' waiver requests had not been acted on, "decline[d] to ... clarify the payphone-specific coding digit requirements set forth in the *Payphone Orders*, because the purpose of this order is to establish a default per-call compensation rate," and stated that it would address payphone-specific coding digit issues in a subsequent order.^{15/} More recently, the Common Carrier Bureau held that "the Commission required that LECs and PSPs provide payphone-specific coding digits to ensure that IXC's could pay per-call compensation, not because they also can be used for blocking calls...."^{16/} The Commission and Staff appear to be backing away from their own prior justifications of the per-call compensation scheme, including representations about call blocking made to the Court in defense of that scheme. Under these circumstances, the Commission's failure to address call blocking issues and to modify the rules accordingly was arbitrary and capricious.

^{15/} *Remand Order*, para. 133.

^{16/} *Memorandum Opinion and Order*, CC Docket No. 96-128, DA 97-2622 (Com. Car. Bur., rel. December 17, 1997), para. 6.

**III. The New Per-Call Default Rate Overcompensates
PSPs for the Provision of Payphone Specific Coding Digits,
and for Other Cost Elements**

6. AirTouch agrees with several petitioners^{17/} that there are serious flaws in the analysis used by the Commission to establish and adjust the local coin market rate to account for the cost differences between coin and coinless payphone calls, and that these flaws resulted in the artificially inflated default per-call compensation rate established in the *Remand Order*.^{18/} Because there is no “rational connection between” the Commission’s decision in the *Remand Order* and the record, *City of Brookings Municipal Tel. Co. v. FCC*, 822 F.2d 1153, 1165 (D.C. Cir. 1987), the Commission must remedy these flaws on reconsideration.

7. As an initial matter, AirTouch agrees with petitioners that the Commission’s continued reliance on \$0.35 as the market rate for local coin service^{19/} is arbitrary. As AT&T notes, the \$0.35 rate was the highest rate among the deregulated payphone markets reviewed by the Commission.^{20/} The Commission failed to explain

^{17/} E.g., Mtel Petition at 7-8; PageNet Petition at 6-10; AT&T Petition at 3-4.

^{18/} AirTouch opposes the petitions for reconsideration filed by the RBOC/GTE/SNET Coalition (“RBOC Coalition”), the American Public Communications Council (“APCC”), and Peoples Telephone Company, which generally defend the Commission’s compensation plan while arguing that the default per-call rate should be increased.

^{19/} *Remand Order*, para. 42.

^{20/} AT&T Petition at 16.

why it did not adopt the lowest rate among deregulated markets, or even a midpoint rate, as it did in other contexts.^{21/} Furthermore, adopting as a starting point the deregulated rate of small, rural payphone markets — where costs are likely to be highest — and then making subtractions and additions to that rate based on the cost data supplied by smaller, independent PSPs, demonstrates that the default per-call rate is too high.

8. The Commission’s decision to “rely on APCC cost data, because these data are representative of the payphone industry as a whole,” cannot stand. As AT&T demonstrates, the record is clear that the non-LEC payphones on which the APCC data is based constitute only 25% or less of all payphones and have higher costs than LEC PSPs.^{22/} The *Remand Order* also inexplicably ignored cost data supplied by Sprint, another non-LEC PSP.^{23/}

9. In the *Remand Order*, the Commission increased the local coin market rate by 1 cent “to account for additional costs to PSPs resulting from ANI ii implementation to identify payphone originated calls for the benefits of IXC’s....”^{24/} However, the APCC cost data relied on by the Commission to derive the \$0.01 add-on figure is not reliable. In

^{21/} See *Remand Order*, para. 63.

^{22/} AT&T Petition at 13; see *Remand Order*, para. 60.

^{23/} See *Remand Order*, n. 267.

^{24/} *Remand Order*, para. 63. AirTouch disagrees that ANI ii implementation is solely, or even primarily, for the benefit of IXC’s. In fact, it substantially benefits PSPs because it is the mechanism by which their calls can be identified for compensation purposes.

fact, APCC itself has submitted revised data showing that the costs of implementing FLEX ANI are one-tenth of its previous figure.^{25/} Accordingly, any add-on for this cost element should be no greater than \$0.001. Moreover, as the Commission is well aware, at least 40% of payphones do not provide ANI ii,^{26/} and thus have incurred no “additional costs” related to ANI ii implementation. Even assuming any add-on for ANI ii implementation is appropriate, it is unreasonable to require that a PSP be compensated for a service that it is not in fact providing.

10. The Commission also should reconsider its decision to increase the local coin market rate by \$0.008 cents “for interest attributable to the delay in compensation for access code and subscriber 800 calls.”^{27/} This issue received scant comment from the parties, and the record does not support the Commission’s apparent conclusion that “the delay in receipt of compensation” would be attributable to the parties paying compensation and therefore is a “cost” to PSPs that should be reimbursed by the paying parties. Accordingly, there should be no add-on for this cost element.

^{25/} Letter from Keith Townsend, USTA, to John Muleta, October 24, 1997, CC Docket No. 96-128. APCC now argues that the add-on cost for ANI ii should be \$0.049 per call, based on spreading the upgrade costs only among dial-around calls. APCC Petition at 16. AirTouch agrees with the Commission’s rationale, *Remand Order* at para. 57, for attributing the cost of ANI ii upgrades to all calls.

^{26/} See *Order*, DA 97-2162 (Com. Car. Bur., rel. October 7, 1997).

^{27/} *Remand Order*, para. 63.

11. Finally, the Commission should adjust the default rate to account for new evidence supplied by AT&T that shows the average monthly cost for a LEC payphone is \$93.11 — far below the \$240.00 per payphone figure supplied by APCC and relied on in the *Remand Order* — and that the average total cost of a coin call is \$0.195 — again, far below the APCC figures but consistent with data supplied by Sprint which the Commission rejected.^{28/}

IV. The Commission's Regulatory Flexibility Analysis Failed to Consider the Interests of All Affected Parties

12. Pursuant to the Regulatory Flexibility Act,^{29/} the Commission was required to conduct an initial regulatory flexibility analysis describing the impact of its proposed payphone compensation rules on small businesses and seeking comment thereon.^{30/} In the *Remand Order*, the Commission erroneously states that it received only one comment “on the potential impact on small business entities” of its proposed rules.^{31/} The record plainly proves otherwise: numerous parties filed comments stating that the Commission's

^{28/} See AT&T Petition at 15.

^{29/} 5 U.S.C. § 601 *et seq.*

^{30/} 5 U.S.C. § 603(a).

^{31/} *Remand Order*, para. 137.

“carrier pays” compensation scheme would have harmful effects on paging companies and other toll free number subscribers.^{32/}

13. Throughout this proceeding, the Commission has ignored concerns that its “carrier pays” scheme significantly harms 800 subscribers and consumers in general. While the rules nominally require IXCs to compensate PSPs, the Commission has given IXCs carte blanche to collect that compensation (and more) from their own customers.^{33/} Wholly apart from the question of whether a competitive PSP marketplace ever could develop under the plan devised by the Commission, it is clear that 800 subscribers will be the ultimate payor of per-call compensation for 800 subscriber calls from payphones. According to the Commission, there are nearly 7 million small entity 800-subscribers and paging companies that may be affected by the payphone decisions.^{34/} These entities will be required to pay the rate imposed by IXCs, to block calls from payphones (thereby harming their businesses) in order to avoid paying compensation, and, if they choose to block, to pay whatever charge is imposed by the IXC for the blocking service.^{35/} There is

^{32/} See, e.g., Comments of AirTouch Paging, July 1, 1996, at 10-12; Reply Comments of Arch Communications Group, Inc., July 15, 1996, at 5.

^{33/} See, e.g., CC Docket No. 96-128, *Report and Order*, 11 FCC Rcd 20541 (1996), para. 86; *Order on Reconsideration*, 11 FCC Rcd 21233 (1996), para. 75.

^{34/} *Remand Order*, paras. 148, 150.

^{35/} See AADS Petition, Attachment 1 (letter from MCI stating that MCI will charge “\$250 per Corporate ID for installation and \$250 per Corporate ID per month for the blocking service.”)

no indication that the Commission has ever during the course of this proceeding fully considered any of these implications for 800 subscribers; it certainly failed to do so in the *Remand Order*. AirTouch agrees with the Consumer-Business Coalition,^{36/} which has submitted extensive information about the effects of the Commission's rules on consumers and 800 subscribers, that on reconsideration the Commission must perform a more searching analysis in order to comply with its obligations under the Regulatory Flexibility Act, and should modify the compensation rules to reduce the impact on affected parties.

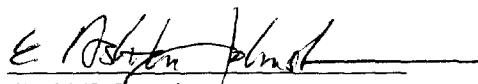
WHEREFORE, the foregoing having been duly considered, AirTouch requests that the Commission take action immediately consistent with the foregoing.

Respectfully submitted,

AIRTOUCH PAGING

Mark A. Stachiw
Vice President & Senior Counsel
AIRTOUCH PAGING
12221 Merit Drive
Suite 800
Dallas, TX 75251
(972) 860-3200

By:


Carl W. Northrop
E. Ashton Johnston
PAUL, HASTINGS, JANOFSKY
& WALKER LLP
1229 Pennsylvania Avenue, N.W.
10th Floor
Washington, D.C. 20004-2400
(202) 508-9500

January 7, 1997

WDC-74389 v1

^{36/} Consumer-Business Coalition Petition at 15 and Exhibit A.

CERTIFICATE OF SERVICE

I, Sharon L. Henry, hereby certify that I have on this 7th day of January, 1997, caused a true and correct copy of AirTouch Paging's foregoing "Comments on and Opposition to Petitions for Reconsideration" to be sent by first-class United States mail, postage prepaid, to the following:

Chairman William E. Kennard*
Federal Communications Commission
1919 M Street, N.W.
Room 814
Washington, D.C. 20554

Commissioner Harold Furchtgott-Roth*
Federal Communications Commission
1919 M Street, N.W.
Room 802
Washington, D.C. 20554

Commissioner Susan Ness*
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

Commissioner Michael K. Powell*
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

Commissioner Gloria Tristani*
Federal Communications Commission
1919 M Street, N.W.
Room 826
Washington, D.C. 20554

John B. Muleta*
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 6008
Washington, D.C. 20554

Robert W. Spangler*
Rose Crellin
Greg Lipscomb
Common Carrier Bureau
Federal Communications Commission
2025 M Street, N.W., Room 6008
Washington, D.C. 20554

Thomas C. Power*
Legal Advisor to
Chairman William E. Kennard
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

James L. Casserly*
Legal Advisor to Commissioner Ness
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

Kevin Martin*
Legal Advisor to
Commissioner Furchtgott-Roth
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

Paul Gallant*
Legal Advisor to Commissioner Tristani
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

Kathleen Franco*
Legal Advisor to Commissioner Powell
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

Thomas Gutierrez
J. Justin McClure
Lukas, McGowan, Nace & Gutierrez
1111 19th Street, N.W.
Suite 1200
Washington, D.C. 20036
(202) 857-3500

Howard J. Symons
Sara F. Seidman
Yaron Dori
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2608
(202) 434-7300

Daniel R. Barney
Robert Digges, Jr.
ATA Litigation Center
2200 Mill Road
Alexandria, VA 22314-4677
(703) 838-1865

Mark C. Rosenblum
Richard H. Rubin
295 North Maple Avenue
Room 3252I3
Basking Ridge, N.J. 07920
(908) 221-4481

Judith St. Ledger-Roty
Kelley Drye & Warren LLP
1200 19th Street, N.W.
Suite 500
Washington, D.C. 20036
(202) 955-9600

Phillip L. Spector
Patrick S. Campbell
Paul, Weiss, Rifkind,
Wharton & Garrison
1615 L Street, N.W.
Washington, D.C. 20036
(202) 223-7300

Alan S. Tilles
Meyer, Faller, Weisman &
Rosenberg, P.C.
4400 Jenifer Street, N.W.
Suite 380
Washington, D.C. 20015
(202) 362-1100

David L. Hill
Audrey P. Rasmussen
O'Connor & Hannan, L.L.P.
1919 Pennsylvania Avenue, N.W.
Suite 800
Washington, D.C. 20006-3483
(202) 887-1431

David J. Kane
Vice-President
All Office Support, Inc.
7181 College Parkway, Suite 30
Fort Myers, FL 33907-5640

Ian D. Volner
Heather L. McDowell
Venable, Baetjer, Howard &
Civiletti, L.L.P.
1201 New York Avenue, N.W.
Suite 1000
Washington, D.C. 20005
(202) 962-4800

SPC Jason M. Kane
United States Army
2/82nd AVN
P.O. Box 70687
Fort Bragg, N.C. 28307

Jennifer Ott
7200 Pinnacle Drive, K-23
Fort Myers, FL 33907

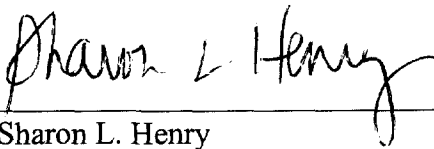
* By Hand.

Bruce W. Renard, General Counsel
Peoples Telephone Company, Inc.
2300 N.W. 89th Place
Miami, FL 33172
(305) 593-9667

Michael K. Kellogg
Kevin J. Cameron
Aaron M. Panner
Kellog, Huber, Hansen, Todd
& Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900

Albert H. Kramer
Robert F. Aldrick
Dickstein, Shapiro, Morin &
Oshinsky LLP
2101 L Street, N.W.
Washington, D.C. 20037-1526
(202) 828-2226

Eric L. Bernthal
Michael S. Wroblewski
Latham & Watkins
1001 Pennsylvania Avenue, N.W.
Suite 1300
Washington, D.C. 20004
(202) 637-2200


Sharon L. Henry